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No. 81-2407

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE MISKOVSKY,

Petitioner,

v.

THE OKLAHOMA PUBLISHING COMPANY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

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BRIEF IN OPPOSITION OF RESPONDENT THE OKLAHOMA PUBLISHING COMPANY

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August 12, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Was the Supreme Court of Oklahoma correct in determining that the Petitioner failed to present sufficient evidence of defamation, falsity and actual malice to submit his case to the jury? *

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* Pursuant to Rule 28.1 the Respondent states that The Oklahoma Publishing Company is a privately-owned company. It has no parent company or affiliates and its only non-wholly owned subsidiary is The Farmer Stockman Publishing Co.

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On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

---

BRIEF IN OPPOSITION OF RESPONDENT THE OKLAHOMA PUBLISHING COMPANY

Respondent The Oklahoma Publishing Company respectfully submits that a writ of certiorari should not issue to review the opinion and judgment of the Supreme Court of the State of Oklahoma entered on January 12, 1982.

OPINION AND ORDER BELOW

The opinion of the Oklahoma Supreme Court has been officially reported at 53 Oklahoma Bar Journal 76, and appears in the Petitioner's Appendix at 1a [hereinafter Pet. App.]. The order of the Oklahoma Supreme Court denying Petitioner's motion for rehearing appears at Pet. App. 19a.

JURISDICTION

Except as discussed in Arguments I and II, *infra*, Respondent is satisfied with Petitioner's jurisdictional statement.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Aside from the Constitutional provisions set forth in the Petition for Certiorari, this case involves Okla. Stat. Ann. tit. 12, § 1443, which is set forth in an Appendix to this Brief.[1]

STATEMENT OF THE CASE

With few exceptions, the errors that Respondent perceives in the Petitioner's statement of the case are not material to the question before the Court. Therefore, no elaborate discussion of the facts is necessary here. A few points, however, require clarification.

The primary for the Democratic nomination for United States Senator from Oklahoma took place on August 22, 1978. On August 10, 1978, less than two weeks before that primary, the Petitioner, one of several candidates for that office, called a news conference at which time he distributed his letter to then Oklahoma Governor, and now United States Senator, David Boren.

In the letter, after a lengthy recitation of allegations which even the Petitioner testified did not support any

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[1] This statute, which was in effect at the time of the publications at issue here, was repealed by 1980 Okla. Sess. Laws Ch. 68, § 1 effective April 10, 1980, because it had been held unconstitutional in a part not pertinent here in *Martin v. Griffin Television, Inc.*, 549 P.2d 85, 90 (Okla. 1976). Subsequently, the relevant portion was re-enacted as Okla. Stat. Ann. tit. 12, § 1443.1 (West 1982), effective April 7, 1981.

charge of homosexuality against Boren (R. 486 (84)),[2] the Petitioner's letter asked the following questions:

> Do you know what a homosexual or bisexual is?
>
> Are you a homosexual or bisexual?
>
> Have you ever been a homosexual or bisexual?
>
> Have you ever engaged in homosexual or bisexual activity? (R. 489, Pl. Ex. 3A, Pet. App. 4a).

Petitioner concluded his letter with the following statement:

> The people are entitled to an immediate response. Such response should be subscribed by you under oath. (R. 489, Pl. Ex. 3A, Pet. App. 5a).

The text of the letter is set forth in full in the opinion of the Oklahoma Supreme Court. (Pet. App. 3a-5a).

Petitioner made the concluding statement in the letter even though he did not believe the rumors that Boren was a homosexual (R. 486 (75, 79); R. 487 (205)), and even though he had no reason to believe the flier or statement of Points. (R. 486 (75); R. 487 (218, 222-23)). Petitioner and his press secretary were both severely displeased and disturbed by the sparse press coverage which Petitioner's campaign had received up to the point of this news conference. (R. 487 (202)).

The opinion of the Oklahoma Supreme Court aptly describes the events surrounding the press conference itself, and the publication of the allegedly libelous matters:

> The letter was delivered to the Governor's office approximately ten minutes prior to a press conference held by Mr. Miskovsky. At the press conference, Mr.

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[2] References are to the Record before the Oklahoma Supreme Court. Each of the three days of trial testimony was given its own record number designation (e.g., 486) and is paginated separately from every other day. Thus, the reference in the text is to page 84 of the transcript of the first day of testimony, which is record document 486.

Miskovsky told members of the press and the media of Mr. Points' statement and of his letter to the Governor.

In preparation for the press conference, Mr. Miskovsky's press agent personally called various members of the media, telling them that this was going to be a "hot" press conference that would be worthy of their attention.

Governor Boren, who was out on the campaign trail, and away from the Capitol, upon hearing of Miskovsky's press conference, flew back to Oklahoma City and held a make-shift press conference at Wiley Post Airport, categorically denying the charges against him.

The next day, August 11, 1978, the Oklahoma Publishing Company (OPUBCO), publisher of *The Daily Oklahoman*, a morning paper, and *The Oklahoma City Times*, an evening paper, published three news articles and an editorial dealing with Mr. Points' charges, Mr. Miskovsky's press conference, and the Governor's response to these events. A few days later, OPUBCO also published an editorial cartoon lampooning Miskovsky's actions. These five publications—three news articles, an editorial, and an editorial cartoon—are the publications which Mr. Miskovsky claims libeled him. Pet. App. 5a.

Petitioner filed suit initially in Oklahoma County District Court on August 16, 1978, six days before the primary. He immediately noticed the depositions of several of his opponents, including Governor Boren, for the Saturday before the Tuesday, August 22, primary. Eventually Petitioner voluntarily dismissed this action while it was pending on the Respondent's motion for summary judgment and refiled his case the next day in the adjacent county, where it proceeded to judgment. The sequence of these events is described more fully by the Oklahoma Supreme Court in *The Oklahoma Publishing Company v. Miskovsky*, 7 BNA Media L. Rptr. 2613 (Okla. 1982), 53 Okla. Bar Journal No. 2 p. 62 (Jan. 12, 1982).

ARGUMENT

I. PETITIONER'S FAILURE TO RAISE THE CONSTITUTIONAL ISSUE PRESENTED IN QUESTION 1 BEFORE THE OKLAHOMA SUPREME COURT DEPRIVES THIS COURT OF JURISDICTION.

For a party to obtain review in this Court of a state court decision on grounds that it offends the Federal Constitution, it is essential that the constitutional claim have been presented to and decided by the highest state court. *Webb v. Webb*, 451 U.S. 493, 495 (1981); *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Bailey v. Anderson*, 362 U.S. 203 (1945); *Crowell v. Randell*, 35 U.S. (10 Pet.) 368 (1836); *see* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 4022 (1977). Unless the record shows that the federal question was raised and decided in the state court, this Court lacks jurisdiction. *Cardinale*, 394 U.S. at 438.

Moreover, when the state court has failed to rule on the federal question, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969).

Petitioner's first Argument is that the Oklahoma Supreme Court "incorrectly held" that he must prove that the defamatory statement was false in order to meet his burden of proof under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). (Pet. 14). Petitioner repeats this theme throughout his first Argument. (Pet. 15, 16-17).[3]

There is no question here that the Petitioner did not—and could not—raise the issue of the burden of proof of falsity before the Oklahoma Supreme Court. The reason

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[3] Petitioner's argument that the Oklahoma Supreme Court misapplied the law with respect to the defamatory meaning of a statement is simply wrong as a matter of Oklahoma Law. See Argument II, *infra*.

is that he not only did not object to the jury instruction which placed that burden on him (Pet. App. 35a), but also he specifically endorsed the instructions as correct.[4]

Before the jury instructions were read, Petitioner's counsel interjected as follows:

> Just a minute.
>
> Your Honor, Plaintiff does not object to any Instructions given, for the record. (R. 488 (187)).

After the instructions were read, counsel for the Petitioner again stated his lack of objection:

> Plaintiff states, for the record, that . . . we believe that the Court did fairly instruct the Jury as to the substance of all the requested instructions, and, for that reason, we have no objection to any of the Instructions as amended. (R. 488 (232)).

Under Oklahoma law, the failure to object to jury instructions constitutes a waiver on appeal of any issues concerning them. *Hames v. Anderson*, 571 P.2d 831, 833 (Okla. 1977).

Moreover, Petitioner repeated his agreement with the instructions in his brief before the Oklahoma Supreme Court:

> A. *The jury in this case was correctly instructed.*
>
> • • • •
>
> It is respectfully contended that a review of the instructions will reveal no fundamental error. (Pet. Br. Okla. Sup. Ct. 29, 31).

The constitutional issue which the Petitioner attempts to raise, therefore, was first raised in this Court.[5] Under

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[4] In addition, the question was clearly decided correctly by both the trial court and the Oklahoma Supreme Court.

[5] As any discussion of the facts of the case well demonstrates, even that supposed constitutional issue is not an important federal question that needs to be decided by this Court, regardless of whether or not it was decided below.

this Court's established precedents, Petitioner's failure to make its constitutional argument below deprives this Court of jurisdiction and the Petition for Writ of Certiorari must be denied.

II. THE DECISION OF THE OKLAHOMA SUPREME COURT WAS BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

It is a second fundamental premise of this Court's jurisdiction that it will not review a state court judgment based upon an adequate and independent state ground, even if a federal question is involved and is perhaps wrongly decided.* *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 636 (1875); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908). Ordinarily it is presumed that a decision is based upon a non-federal ground in the record which may be adequate to support it. Jurisdiction will be declined unless there is an affirmative showing that a federal question was presented to the state court and that a decision on the issue was necessary to the state court's determination. *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54-55 (1934); *Adams v. Russell*, 229 U.S. 353, 358 (1913). The burden is on the Petitioner to show that the state ground cannot account for the decision below. *Durley v. Mayo*, 351 U.S. 277, 281 (1956). That burden is not met if it appears that the judgment below might have rested on a non-federal ground. *Id.*; *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952); *Ellis v. Dixon*, 349 U.S. 458, 459 (1955).

In the instant case, the jury was properly instructed as the Petitioner concedes (Pet. 11; p. 6, *supra*), that it could not return a verdict for the plaintiff unless it found that the Respondent had "accused [the plaintiff] of committing a crime." (Pet. App. 37a, Instruction No. 11). This is because under the Oklahoma statute in

* Of course, the Respondent does not believe or concede that any federal question was wrongly decided below.

effect at the time, in the words of the jury instruction, "[i]n this state a publisher may criticize the acts of a candidate for public office such as the Plaintiff without fear of committing a libel unless the plaintiff was accused of committing a crime." (*Id.*).

The privilege referred to by the trial court was found at Okla. Stat. Ann. tit. 12, § 1443, set forth in the Appendix. That privilege is absolute. *Fawcett Publications, Inc. v. Morris*, 377 P.2d 42, 52 (Okla. 1962), *cert. denied*, 376 U.S. 513 (1964); *Thompson v. Newspaper Printing Co.*, 325 P.2d 945, 947 (Okla. 1958). It makes no difference that the criticisms were justified, had any merit, were false or were made with malice. *Pacific Employers Ins. Co. v. Adams*, 196 Okla. 597, 168 P.2d 105, 107 (1946). The only exception to this privilege is the false imputation of a crime.

The Oklahoma Supreme Court, in discussing the editorial which was claimed to be libelous, found as follows:

> In so holding, we note that no evidence at the trial was introduced to show that any reader interpreted the statement to have imputed the commission of criminal libel on Mr. Miskovsky's part. (Pet. App. 15a).[7]

Proof of the imputation of a crime was a necessary part of the Petitioner's case under state law and no evidence was introduced to support such a finding. Because the decision below thus rests on an adequate and independent state ground, this Court lacks jurisdiction to review it.

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[7] Even if an imputation of criminal libel had been made, Oklahoma's criminal libel statute is clearly unconstitutional. *Garrison v. Louisiana*, 379 U.S. 64, 70 n. 7 (1964). This point was argued extensively below by the parties, but was not reached by the Oklahoma Supreme Court, given its disposition of other issues.

III. THE REMAINING ISSUES SOUGHT TO BE RAISED BY THE PETITIONER WERE PROPERLY DECIDED BELOW.

A. The Oklahoma Supreme Court Applied The Proper Standard of Review.

Petitioner criticizes the Oklahoma Supreme Court for failing to "cite a single Oklahoma case" concerning the proper standard of review. Both parties below cited and relied upon *Hodges v. Oklahoma Journal Publishing Co.*, 617 P.2d 191, 194 (Okla. 1980) as stating the standard of review. As the Petitioner stated in its brief to the Oklahoma Supreme Court, "that case [*Hodges*] correctly describes this Court's role." (Pet. Br. Okla. Sup. Ct. 29).

Hodges itself held that it was the Oklahoma Supreme Court's duty "to consider the law and to make an independent evaluation of the record to insure the constitutional protection of the First Amendment." 617 P.2d at 194.

B. The Oklahoma Supreme Court Properly Determined That the Three News Stories And The Editorial Were Not Libelous.

Petitioner argues on several occasions that it was error for the Oklahoma Supreme Court to examine the record to determine whether the Petitioner had shown the publication of a defamatory statement. (Pet. 13, 14, 18-19 n. 15, 23 n. 20, 25). It is clear, however, that Oklahoma law required the Court to do exactly that:

> No one seems to dispute the well established law, both generally and in Oklahoma, that in libel and slander actions the trial court must first determine whether a publication is libelous per se. If it is not libelous per se, the court has the further duty to determine as a matter of law whether the writing is susceptible of a defamatory meaning derivable from extrinsic facts and circumstances which must be spe-

> cifically pleaded and supported by proof of special damages, i.e. libelous per quod. *M. F. Patterson Dental Supply Co. v. Wadley*, 401 F.2d 167, 169 (10th Cir. 1968), and cases cited at 170.

And it is clear that the Oklahoma Supreme Court was obligated to follow the same standard on review. *See, e.g., Winters v. Morgan*, 576 P.2d 1152, 1154 (Okla. 1978); *Kee v. Armstrong, Byrd & Co.*, 75 Okla. 84, 182 P. 494 (1919).

Here the Oklahoma Supreme Court examined the three news stories and one editorial which were claimed to be libelous and found that none of them defamed the Petitioner or were false. (Pet. App. 9a-15a). Petitioner does not point to any statement which was false or defamatory. Instead, his primary argument is that the use of the word "raised" was a statement "accusing Miskovsky of actually making the allegations" concerning homosexuality. (Pet. 24). The words of the Court below adequately dispose of this argument:

> To say that Mr. Miskovsky did not increase the intensity of the allegations made by Mr. Points would be sheer nonsense.
>
> • • • •
>
> To hold that Mr. Miskovsky's actions could not be taken as implications of homosexuality would be a denial of the obvious. (Pet. App. 12a).

Petitioner himself testified at trial that he had no proof that any statement in any of the three news stories was false. (R. 486 (132)).

With respect to the editorial, Petitioner argues that it was not a statement of opinion because it accused him of criminal libel. Leaving aside the fact that it is an editorial which is being discussed, as has been shown previously at p. 8, *supra*, the Oklahoma Supreme Court found there was no evidence introduced showing that anyone did or even could have considered the editorial as

accusing the Petitioner of criminal libel. (Pet. App. 15a). Moreover, such an inference would have defied common sense. *See, e.g., Gibson v. Kincaid*, 221 N.E. 2d 834, 837 (Ind. App. 1966).

Finally, although the Petitioner's question presented is whether there was "sufficient evidence of undisclosed defamatory facts" in the news articles and the editorial, he never once sets forth how these publications implied the existence of undisclosed facts.

C. Petitioner's Argument With Respect to the Cartoon Has no Legal or Factual Support.

Petitioner's second argument is that the Oklahoma Supreme Court should have deferred to the jury's supposed conclusion as to the Respondent's state of mind. (Pet. 18). This argument ignores what the Petitioner himself recognizes earlier:

> It is now well settled that the finding of actual malice is a "constitutional fact" subject to *de novo* review by this Court. (Pet. 13).

The Respondent's state of mind is identical to the issue of actual malice—was the publication made with knowledge of falsity or with a subjective awareness of probable falsity of its content. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 n.6 (1974). Thus not only are the Petitioner's arguments inconsistent on their face, but also their acceptance would require overruling what even the Petitioner recognizes as "well settled" principles.

Petitioner's factual argument with respect to the editorial cartoon which was published within one week of the end of a hotly contested primary campaign is that it was not hot news and that its "charges" should have been investigated. (Pet. 22). The Oklahoma Supreme Court gave the Petitioner the benefit of every doubt and assumed, without deciding, that the editorial cartoon was a defamatory statement of fact that had the strained mean-

ing which the Petitioner attached to it. (Pet. App. 15a-16a, 17a). But the Court concluded that

> there simply was no evidence introduced to show that the paper intended to use false statements, or that the paper had any serious doubts as to the statements they published.
>
> Lastly . . . there was no evidence that OPUBCO, at the time of publication, knew the meaning was false. (Pet. App. 17a).

The Petitioner points to no evidence which supports any contrary conclusion.[8] Because the Oklahoma Supreme Court properly applied the principles laid down by this Court in many earlier cases, *e.g.*, *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), review of its decision should not be granted.

D. The Petitioner's Fourth Ground For Review Is Frivolous On Its Face.

This case concerns five publications made immediately before a primary election for United States Senate. As a case dealing with an election, it lies at the core of First Amendment protections.

In *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300-01 (1971), this Court held:

> Public discussion about the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule.

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[8] Petitioner's reference to the alleged testimony of Mr. Lee (Pet. 21), is disingenuous. First, Mr. Lee had nothing to do with the publication of the cartoon. He saw it for the first time only after it was published. (R. 487 (35)). Second, the trial court sustained objections to this line of questioning, holding it immaterial and stating to Petitioner's counsel that he hadn't "established anything. You are reading from a Deposition without establishing some kind of reason for it." (R. 487 (37)).

Similar expressions of the core meaning of the First Amendment are found in *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966), *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978), and *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

In *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), this Court advised extreme caution when dealing with defamation actions growing out of a campaign:

> The application of the traditional concepts of tort law to the conduct of a political campaign is bound to raise dangers for freedom of speech and of the press. . . . *A community that imposed legal liability on all statements in a political campaign deemed "unreasonable" by a jury would have abandoned the First Amendment as we know it.* 401 U.S. at 275 (emphasis added).

In the Petitioner's fourth Argument, he asks this Court to abandon the First Amendment in an election campaign by allowing a jury to find that the Respondent's criticism of him was unreasonable without regard to whether it was defamatory or published with *New York Times* malice. (Pet. 27, 28). Yet "[f]reedom of the press surely includes the freedom to call to readers' attention the activities of politicians, even in terms that invite suspicion, and even though those suspicions may prove groundless." Anderson, *A Response to Professor Robertson: The Issue Is Control of Press Power*, 54 Tex.L.Rev. 271, 279 (1976).[9] Because Petitioner's request is basically that this Court rule that First Amendment principles be abandoned in election campaigns, when they are most vital, the Petition should be denied.

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[9] Curiously, the author of this article appears as "Of Counsel" on the Petition.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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August 13, 1982

APPENDIX

Okla. Stat. Ann. tit. 12, § 1443 (as in effect August 1978):

> A privileged publication or communication is one made:
>
> . . . .
>
> Third. By a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all criticisms upon the official acts of any and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticized.
>
> . . . No publication which, under this section, would be privileged shall be punishable as libel.